

***United States Court of Appeals
for the Second Circuit***



**BRIEF FOR
APPELLEE**

76-1193

IN THE
United States Court of Appeals
FOR THE SECOND CIRCUIT

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

v.

CLAYBURN C. BOOTH,
Defendant-Appellant.

BRIEF FOR APPELLEE

RICHARD J. ARCARA,
United States Attorney,
Western District of New York,
Attorney for Plaintiff-Appellee,
502 United States Courthouse,
Buffalo, New York 14202.

THEODORE J. BURNS,
Assistant United States Attorney,
of Counsel.

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CLAYBURN C. BOOTH,

Defendant-Appellant.

BRIEF FOR APPELLEE

Preliminary Statement

Dr. Clayburn C. Booth was tried on a three-count indictment charging him with attempting to evade his federal income taxes for the years 1966 through 1968. After a six day trial before the Honorable John T. Curtin the jury returned guilty verdicts on all three counts. Judge Curtin denied motions for a judgment of acquittal or a new trial. Dr. Booth was sentenced to a fine of \$3,500. He now appeals, alleging that the evidence was not legally sufficient to establish that he willfully intended to evade payment of the income taxes owed by him.

Statute Involved

Dr. Booth was charged with violating Title 26, United States Code, Section 7201 which provides as follows:

Any person who willfully attempts in any manner to evade or defeat any tax imposed by this title or the payment thereof shall, in addition to other penalties provided by law, be guilty of a felony and, upon conviction thereof, shall be fined not more than \$10,000, or imprisoned not more than five years, or both, together with the costs of prosecution.

Statement of the Case

The Government relied upon the bank deposits/cash expenditures theory of proof to establish understatement of income for the three years in question. Ten witnesses testified for the Government. Sixteen Stipulations of expected testimony were read to the jury (Transcript, 86-1 through 86-16).

The Stipulations established that Dr. Booth received taxable income from a variety of sources, most of which related to his practice as a physician during the indictment years. Norman Jansen, Vice-President of Blue Shield of Western New York, testified that Dr. Booth received substantial sums of money from Blue Shield for treatment of patients whose medical expenses were covered by Blue Shield insurance policies (T. 87-131). Robert Clark, an Assistant Security Officer for Marine Midland Bank, identified Government Exhibits 17 through 41, the defendant's bank records which formed the basis for the Government's bank deposits analysis.

Two friends and associates of Dr. Booth testified. Bonelle Balch, his office receptionist, described the defendant's medical practice, billing procedure and office receipts (T.

191-216). Dominick Lonardo, who prepared Dr. Booth's tax returns for the indictment years, testified regarding the preparation of the returns and the information provided by Dr. Booth to him (App 82a-86a).

The principal Government witnesses were Internal Revenue Service agents who testified about their investigation of Dr. Booth's tax returns. Based upon the evidence introduced at trial, Special Agent David Ciesla prepared a bank deposits analysis, indicating that Dr. Booth had understated his income by \$12,059.87, \$12,098.27 and \$13,672.45 in 1966, 1967 and 1968 respectively (Government Exhibit 48, Supplemental Appendix 96). Revenue Agent Edward Reilly testified that there was additional tax of \$3,302.20, \$4,540.01 and \$6,243.85 due and owing on the unreported income (T. 580, 582, 586.)*

Dr. Booth did not testify and the defense presented no witnesses.

ARGUMENT

POINT I

The evidence was sufficient to establish the element of willfulness.

To establish a violation of Section 7201, the Government must prove beyond a reasonable doubt that a substantial additional amount of federal income tax was due and owing by the defendant for the indictment year, over and above the amount declared or disclosed by the defendant in his income tax returns; and that the defendant willfully attempted, in some manner, to evade the additional tax with the specific in-

* Two years after the investigation began, Dr. Booth filed amended returns for the indictment years in which he admitted understating his income by greater amounts. See Appellant's brief, page 3.

tent to defraud the Government of such tax. *United States v. Coppola*, 425 F.2d 660 (2nd Cir., 1969).

The facts in this case are not disputed. In filing amended returns two years after the investigation began, Dr. Booth effectively conceded that he failed to report a substantial amount of income earned by him during the indictment years. (Government Exhibits 4-6, Supplemental Appendix 140-142). Therefore, the sole question at trial and on this appeal is whether Dr. Booth willfully attempted to evade the tax due on the unreported income.

In prosecutions for tax fraud, proof of willfulness may be established in several different ways. Absent an admission or confession by the defendant, or testimony by an accomplice, willfulness is rarely subject to direct proof; it must generally be inferred from the particular circumstances of each case. *United States v. Magnus*, 365 F.2d 1007 (2nd Cir., 1966), cert. denied 396 U.S. 909; *Paschen v. United States*, 70 F.2d 491 (7th Cir., 1934); *United States v. Spinelli*, 443 F.2d 2 (9th Cir., 1971); *United States v. Ramsdell*, 450 F.2d 130 (10th Cir., 1971). Circumstantial evidence alone is sufficient to allow a case to go to the jury. *United States v. Nathan*. Docket Number 75-1421, slip opinion 4201, 4205 (2nd Cir., decided June 16, 1976).

Willfulness has been defined in various ways. It is "a voluntary, intentional violation of a known legal duty". *United States v. Bishop*, 412 U.S. 346, 360 (1973). It includes "some element of evil motive and want of justification in view of all the financial circumstances of the taxpayer." *Spies v. United States*, 317 U.S. 492, 498 (1943). An attempt to evade payment of taxes may be willful if the taxpayer "knew that he should have reported more income than he did". *Sansone v. United States*, 380 U.S. 343, 353 (1965).

Willfulness may be inferred from the taxpayer's conduct, including substantial understatement of his income in suc-

cessive years, *United States v. Holland*, 348 U.S. 121 (1954); *United States v. Moran*, 236 F.2d 361 (2nd Cir. 1956), cert. denied, 352 U.S. 909; *United States v. Siragusa*, 450 F.2d 592 (2nd Cir., 1971) cert. denied 405 U.S. 974; concealment of sources of income, *Spies v. United States*, *supra*; *United States v. Wenger*, 445 F.2d 308 (2nd Cir., 1972), cert. denied 407 U.S. 920; handling of one's affairs to avoid making the records necessary to determine income; *Spies v. United States*, *supra*; *Garipey v. United States*, 189 F.2d 459 (6th Cir., 1951); *United States v. Dowell*, 466 F.2d 145 (10th Cir., 1971) cert. denied 404 U.S. 984; failure to supply the tax preparer with correct information regarding tax liability, *Clark v. United States*, 211 F.2d 100 (8th Cir., 1954); *United States v. Pepe*, 360 F.2d 1015 (3rd Cir., 1966); *Sherwin v. United States*, 320 F.2d 137 (9th Cir., 1953); *Holbrook v. United States*, 216 F.2d 238 (5th Cir., 1964); withholding records from the Internal Revenue Service agents while ostensibly cooperating with their investigation, *United States v. Glascott*, 216 F.2d 387 (7th Cir., 1954); *Clerk v. United States*, *supra*; false exculpatory statements by the taxpayer, *United States v. Murray*, 297 F.2d 812 (2nd Cir., 1962) cert. denied 360 U.S. 828. The taxpayer's education and background may also be probative of willfulness. *United States v. Coblenz*, 453 F.2d 503 (2nd Cir., 1972) cert. denied 406 U.S. 918.

From the evidence presented at trial, which must be viewed on appeal in the light most favorable to the Government, *Glasser v. United States*, 315 U.S. 60 (1942); *United States v. Slutsky*, 487 F.2d 832, 835 (2nd Cir., 1973), the jury could properly infer willfulness from the conduct of Dr. Booth described below.*

* Judge Curtin agreed. At the defendant's sentencing he said, "I think the jury verdict was clearly right, supported by the evidence . . ." (T. 773).

A. The defendant substantially understated his income in successive years.

According to Agent Ciesla's bank deposits analysis, Dr. Booth understated his taxable income by approximately \$37,000 over a three year period, in roughly equal amounts each year. This substantial understatement of income for several successive years indicates a pattern of conduct from which the jury could reasonably conclude that the taxpayer knew he was evading the payment of taxes owed by him.

B. The defendant concealed sources of his income.

The jury could also properly infer willfulness from Dr. Booth's concealment of the checks he received from his office patients. Agent Ciesla testified that Dr. Booth deposited approximately 2,200 checks to his bank account in the indictment years (Suppl App 54). However, the income represented by only 247 of these checks was reported in Dr. Booth's tax returns (Suppl App 46). The defendant's explanation to Agent Ciesla, which the jury obviously rejected, was that "it never occurred to him that the checks he received in his practice should be included in the office receipts. He said that once these checks were deposited, he assumed they would be reported." (Suppl App 54). By whom?

C. The defendant handled his affairs to avoid making the records necessary to determine income.

Mrs. Balch testified that no records were maintained of the checks received from Dr. Booth's office patients. They were simply placed in a desk drawer together with cash received from the patients until the doctor or his wife or Mrs. Balch deposited them in Dr. Booth's checking account (T. 195-196). The records of cash received were equally inadequate. Lonardo said the only records regarding cash receipts were slips of paper. Where, as here, "there was evidence of a consistent pattern of under reporting large amounts of income,

and of the failure on (defendant's) part to include all of (his) income in (his) books and records . . . the jury could have found that these acts supported an inference of willfulness". *Holland v. United States*, 348 U.S. 121, 139 (1954).

More recently, this Court held that

Once the government showed that appellants' accounting system was such as to permit the non-disclosure of income, as well as the existence of substantial amounts of excess deposits which, after reasonable investigation, had the appearance of income, that was sufficient to warrant submitting the case to the jury. *United States v. Slutsky*, 487 F.2d at 842.

D. The defendant failed to provide the tax preparer with correct information.

From the extensive material given him by Dr. Booth, Lonardo was able to prepare very detailed summaries of the defendant's expenses (App 14a-15a). On the other hand, the only records Lonardo received from Dr. Booth relating to office receipts were twelve single slips of paper. At the end of each year, Dr. Booth gave Lonardo a slip of paper for each month of the year, with the total amount of cash received that month (App 17a). Furthermore, although the "Dome Simplified Weekly Bookkeeping Record" had space for both income and expense items, Dr. Booth provided Lonardo with detailed information about his expenses only, with little or no regard to his office receipts.

In hopes of insulating himself from any liability for Lonardo's work, the defendant now attempts to explain away the substantial understatement of income by contending that he gave Lonardo all the information asked of him. However, his argument overlooks the customary rule that "reliance upon an accountant's work is never a defense to criminal charges of fraudulent nondisclosure when the defendant asserting reliance has not disclosed all material facts to the

accountant" *United States v. Tolkow*, 532 F.2d 853, 857 (2nd Cir., 1976).

This defense argument also ignores the close relationship between Dr. Booth and his tax preparer which might cause the jury to believe that Lonardo was attempting to place Dr. Booth in the best light possible. Lonardo said he was a patient of the doctor and began keeping the doctor's books because, "Well, I was going to try to help him" (App 11a). He prepared the defendant's tax returns because "I wanted to help the doctor out" (App 27a). Lonardo charged nothing for his services and, in return, received free medical services for himself and his family (App 27a-28a). Understandably, Lonardo chose not to sign the defendant's returns although he acknowledged preparing them. According to Lonardo, "In my humble opinion, I felt it was not necessary to sign it" (App 33a). His reasons? "Just my opinion. I have no reason" (App 33a).

From these facts regarding nondisclosure, a jury could permissibly find the willfulness required by Section 7201. *United States v. Rosenthal*, 470 F.2d 837, 842 (2nd Cir., 1972); *United States v. Procaro*, 356 F.2d 614, 618 (2nd Cir., 1966).

E. The defendant withheld records from the Internal Revenue Service Agents.

Dr. Booth reminds this Court that he cooperated with the agents investigating his tax returns. To a certain extent, he did. He voluntarily gave some bank records and copies of his tax returns to Revenue Agent Luke in September 1969 (T. 301-304, 307). Later, he consented to interviews with Special Agents Pasquarella and Ciesla (Suppl App 4-16, 51-62). At the final interview, Dr. Booth was represented by his trial counsel, Harold Fein (Suppl App 51).

While the defendant did in fact give the investigators certain records, he apparently did so selectively. It was not until trial that he chose to produce the "Dome Simplified Weekly

Bookkeeping Record" of his expenses (defendant's exhibit 19: App 33a; Suppl App 96). He has never produced the cash receipts book which Mrs. Balch testified was kept in Dr. Booth's office (T. 194).

Under these circumstances, where the defendant withheld some records from the investigators while ostensibly co-operating fully with them, the jury could infer that he acted willfully in failing to report the tax information which might be found in the undisclosed records. *United States v. Slutsky*, 487 F.2d 832, 844 (2nd Cir., 1973).

F. The defendant made false exculpatory statements to the Internal Revenue Service Agents.

When first confronted with the possibility that his bank deposits indicated a substantial understatement of income in 1968, Dr. Booth told Revenue Agent Luke that he had accumulated \$13-16,000 in cash in prior years which he had kept in a strong box at his home. He told Luke he deposited this cash to his bank accounts in 1968 and this might account for the excess deposits (T. 305-306). Within a few weeks, Dr. Booth repeated this explanation in an unsolicited note written to Luke (Government exhibit 42, Suppl App 144).

When Special Agent Pasquarella interviewed him approximately one month later, Dr. Booth again said that in 1968 he had deposited \$16,000 in cash in one of his bank accounts. After Pasquarella carefully explained what he meant by "cash on hand", Dr. Booth said that he had been saving cash since his Army days (early 1950's) and kept it in a dresser drawer in his home (Suppl App 9-11).

Dr. Booth's bank records, all of which were in evidence at the trial, contradicted his "cash hoard" defense; no cash was deposited in his checking or savings account for any of the indictment years. The deposits were all checks. The \$16,000 mentioned by Dr. Booth represented two transfers from his

checking to his savings account (Government exhibit 28). His statement to the investigators that he had kept money at his home since his Army days was further rebutted by his claim in a mortgage loan application that, in 1964, he had no cash on hand (Government exhibit 41, Suppl App 143).

Since the defense offered no explanation at trial for these obviously false exculpatory statements, the jury could properly find that the defendant's statements indicate a consciousness of guilt. Together with the other evidence of the case, they are sufficient to support a finding of willfulness. *United States v. Murray*, 297 F.2d 812, 815 (2nd Cir., 1962).

G. The defendant is a highly educated person.

The defense now argues that Dr. Booth "lacked both understanding and experience in tax matters" and that "he had little interest in the subject, and perhaps less time for it". Furthermore, "he did not have the ability to prepare his own return when all he had was a W-2, much less a return that included business expenses, apportionments, depreciation schedules and income averaging" (Appellant's brief, pages 14-15).

This argument is pure speculation and finds no support in the record. Dr. Booth did not testify and called no witnesses on his behalf. Lonardo, who might have some knowledge of Dr. Booth's expertise in tax matters, was not asked any questions in this area.

Special Agents Pasquarella and Ciesla did testify about the defendant's background. Dr. Booth told them he was born in 1928, was honorably discharged from the Army in 1952, attended City College of New York, was graduated in 1960 from the University of Heidelberg with a Medical Degree, and has been a practicing physician in Niagara Falls, New York since the early 1960's (Suppl App 6-7, 61-62). The bank records and Stipulations of expected testimony indicate that

Dr. Booth owned property and had substantial outside investments which he apparently was able to manage by himself (T. 86-1 through 86-16).

In short, Dr. Booth was an educated man, free of debt, able to earn a good living and capable of handling his own financial affairs. From this evidence of the defendant's background, together with the other evidence in the case, the jury could find beyond a reasonable doubt that the defendant willfully attempted to evade his taxes.

Conclusion.

For the reasons stated above, it is respectfully submitted that the judgment of conviction should be affirmed.

Respectfully submitted,

RICHARD J. ARCARA,
United States Attorney,
Western District of New York,
502 United States Courthouse,
Buffalo, New York 14202.

THEODORE J. BURNS,
Assistant United States Attorney
of Counsel.

AFFIDAVIT OF SERVICE BY MAIL

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County of Genesee) ss.:
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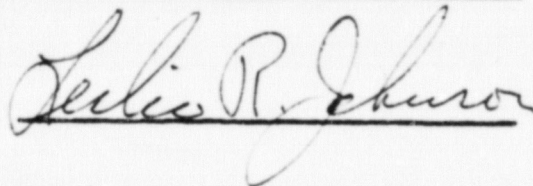
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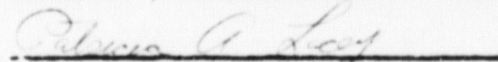
Richard J. Arcara, U.S. Attorney, Att: Theodore J. Burns, Asst.

U.S. Attorney
502 U.S. Courthouse, Buffalo, New York 14202



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